GEMENCHEH ENTERPRISES SDN BHD

v.

AIKPOINT DEVELOPMENT SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[WRIT OF SUMMONS NO: 22-21-2000]
20 OCTOBER 2005

CONTRACT: *Sale and purchase of land - Specific performance - Whether a sale and purchase agreement existed between parties - Whether enforceable*

The defendant company was the registered proprietor of 29 acres and 1 rood of land ('the land') which the defendant agreed to sell to the plaintiff at RM31000 per acre, the entire purchase price being RM906,000. The plaintiff forwarded a draft sale and purchase agreement ('SPA') and 10% of the purchase sum as deposit to the defendant. The defendant issued a receipt for the deposit and confirmed in a written reply that it had no objection to the draft SPA. The defendant then requested fair copies of the SPA that were duly executed by the plaintiff and forwarded to the defendant. However, the defendant refused to execute the SPA and returned the deposit sum with all accumulated interest claiming that there was a disagreement between the defendant's shareholders in respect of the sale of the land. The plaintiff declined to accept the deposit and interest. Hence, this application by the plaintiff for specific performance of the fair copy of the SPA, a declaration that the plaintiff was entitled to a *lien* on the land and that the defendant was holding the land as trustee for the plaintiff. Also, damages for breach of the SPA with interest. The defendant argued that the sale of the land by a firm of solicitors, Messrs Koh Nai Kwong & Associates was upon the instructions of three persons, one YM Chong, one Lim Kim Guan and one Cheng Chong Par ('the trio'). YM Chong was the defendant's director whilst Lim and Cheng were beneficiaries of shares in the defendant under certain undisclosed trust documents. There was no written resolution by the defendant or any authorisation whatsoever to sell the land. As such, the said solicitors were acting for the trio and not for the defendant.

Held (allowing application):

[1] A proper perusal of the SPA revealed the defendant as the vendor whose solicitors were Messrs Koh Nai Kwong & Associates. Further the letter dated 8 May 1999 from the said solicitors to the plaintiff's solicitors clearly

showed that they were acting for the defendant as vendor. As such, there was no merit in the defendant's submission that Messrs Koh Nai Kwong & Associates were acting for the trio and not the defendant. (p. 140 d-f)

[2] Lim and Cheng being beneficiaries and not directors nor registered shareholders of the defendant had no rights in the defendant and could not play any role in the management of the defendant. YM Chong as director of the defendant had apparent or ostensible authority to represent the defendant in the sale and purchase transaction that resulted in the receipt of the deposit and the preparation of the fair copy of the SPA for execution by the defendant. It followed that the defendant was estopped and prevented from asserting that the defendant was not bound by the contract. (pp. 140 f-h & 141 g)

[3] On the defendant's submission that there was no company resolution in respect of the sale of the land, the rule in *Royal British Bank v. Turquand* applied. Strangers or outsiders dealing with a company in good faith are entitled to assume that matters of internal management and/or acts within such company's constitution and powers have been properly carried out and duly performed. Apart from relying on what is disclosed by a company's document such as Form 49 and the memorandum and articles of association of the company, an outsider contracting with the company has no duty to conduct an investigation as to the capacity of the company's officials dealing with him. The plaintiff herein acted in good faith in dealing with the defendant through YM Chong and was entitled to assume that the internal management of the defendant and acts were within the defendant's constitution and powers. That certainly included the decision to sell. The existence or otherwise of a company resolution for the sale of the land was exclusively an internal management for which the plaintiff was entitled to assume was properly carried out and duly performed by the defendant. It followed that there existed a sale and purchase agreement between the parties herein. (pp. 141 h & 142 a-f)

[4] The facts pointed to an irresistible positive intention of the parties in proceeding towards the completion of the SPA rather than a withdrawal. All the essential ingredients of a legally binding contract, namely, consensus *ad idem*, intention to create legal relations and considerations were present. There was no evidence of any vitiating factor preventing the coming into force of a lawful contract. (pp. 142 h & 143 a-b)

[5] A written memorandum that contains the essential elements, namely, the names of the parties, description of the property and the price is a valid contract of sale and purchase of property. The absence of the company's stamp is quite immaterial. There were merits in the plaintiff's claim that the plaintiff had proved under s. 101 of the Evidence Act 1950. The SPA was therefore specifically enforceable. (p. 143 d-f)

[Order in terms; damages, if any, to be assessed.]

Case(s) referred to:

Annamalai Subramaniam Chettiar v. Perbadanan Pembangunan Bandar [2000] 3 CLJ 318 CA ***(refd)***

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor [1964] 2 QB 480 ***(refd)***

Koh Kia Hiong v. Guo Enterprises Pte Ltd [1990] 1 CLJ 919; [1990] 3 CLJ (Rep) 669 HC ***(refd)***

Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 2 MLJ 39 FC ***(refd)***

MMC Power Sdn Bhd & Anor v. Abdul Fattah Mogawan & Anor [2001] 1 CLJ 207 211 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Royal British Bank v. Turquand [1856] 119 ER 474 HL ***(refd)***

Sundram Properties Sdn Bhd v. Cyril Wettasinghe & Ors [1987] 1 CLJ 213 HC ***(refd)***

Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Rules of the High Court 1980, O. 18 r. 19

For the defendant - Yau Jiok Hua (Yong Cheng Lim); M/s Yong Cheng Lim & Saridah,

For the plaintiff - Kelvin Chow (Han Chooi Lin); M/s SK Khoo & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Plaintiff's Claim

In this action against the defendant, the plaintiff prays for specific performance of the fair copy of the sale and purchase agreement made between the plaintiff and the defendant; a declaration that the plaintiff is entitled to a lien on the land and that the defendant is holding the land as trustee for the plaintiff; damages for breach of agreement together with interest at 8% p.a. from the date of judgment to the date of realisation; and costs.

Factual Background

The defendant is the registered proprietor of the land known as Lot 406 held under Geran No. 4438 in the mukim of Selandar, district of Jasin, Melaka ("the land") with an area of 29 acres and 1 rood.

At the trial of this action, one Tiow Kim Pian (plaintiff's director) PW1 testified that in April 1999 he met with a director of the defendant one YM Chong who told PW1 that the defendant intended to sell the land. The plaintiff had agreed to buy the land at RM31,000 per acre. The entire purchase price was RM906,000.

The defendant's director ie, YM Chong told PW1 that the defendant's then solicitors were Messrs Koh Nai Kwong & Associates ("the defendant's then solicitors") to whom 10% of the purchase price may be paid. Pursuant thereto, PW1 instructed solicitors Messrs SK Khoo & Associates ("plaintiff's solicitors") to act for the plaintiff.

PW2 Mr. Wong Nai Chee an advocate and solicitor, then a legal assistant in the firm of the plaintiff's solicitors, was in charge of the plaintiff's file in respect of the purchase of the land. PW2 had forwarded the draft sale and purchase agreement ("the draft SPA") as well as 10% of the purchase price ("the deposit") to the defendant's then solicitors, who upon receipt thereof had issued a receipt for the deposit and confirmed in their written reply to the plaintiff's solicitors that the defendant had no objection to the draft SPA and asked the plaintiff's solicitors to forward fair copies of the SPA to them as the defendant's then solicitors for execution by their client ie, the defendant.

PW2 accordingly forwarded to the defendant's then solicitors fair copies of the SPA which had been duly executed by the plaintiff. However, the defendant had refused to execute the SPA. Subsequently, the defendant's then solicitors returned the deposit together with all accumulated interest, stating that there was disagreement amongst the defendant's shareholders in respect of the sale of the land.

The plaintiff's solicitors declined to accept the returned deposit and interest, but had instead re-posted the same to the defendant's then solicitors and informed them of the plaintiff's intention to proceed with specific performance against the defendant in respect of the fair copies of the SPA.

PW3 Mr. Koh Nai Kwong is an advocate and solicitor practising as Messrs Koh Nai Kwong & Associates. He testified that he was instructed by three persons viz YM Chong, one Lim Kim Guan and one Cheng Chong Par ("the trio") in respect of the sale of the land. He sent all letters and the draft SPA to the trio in Singapore but not to the defendant's registered address in Melaka.

PW3 said that there was no written resolution of the defendant to sell the land or authorising YM Chong to instruct PW3's firm in respect of the sale of the land. PW3 confirmed that YM Chong was defendant's director while Lim and Cheng were not the registered shareholders of the defendant but were "beneficiaries of shares in the defendant" under certain undisclosed trust documents.

DW1 the company secretary of the defendant testified that there was no record in the defendant's books concerning the resolution to sell the land or to authorise YM Chong or any other person to instruct the defendant's then solicitors in relation to the sale of the land.

Agreed Issues For Determination

The parties herein have agreed that the issues for determination are:

1. Whether there exists a sale and purchase agreement between the parties herein ("Issue 1")? and

2. If there is, whether the plaintiff can enforce such agreement ("Issue 2")?

Issue 1: Any Agreement?

Learned counsel Mr. Yau Jiok Hua, assisted by Mr. Yong Cheng Lim, submitted for the defendant that neither the trio nor any one of them had the authority, express or implied, of the defendant to sell the land, or to instruct the defendant's then solicitors in relation to the sale of the land and that the defendant's then solicitors had acted without the authority of the defendant in respect of the SPA. Reference was made to, *inter alia*, *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC.

In response, learned counsel Mr. Kelvin Chow and Miss Han Chooi Lin, contended for the plaintiff that:

1. the plaintiff was not concerned with the actions of the other two persons viz Lim and Cheng who were neither the directors nor shareholders of the defendant; and

2. YM Chong had the requisite ostensible authority when he offered to sell the land to the plaintiff and appointed the defendant's then solicitors for that purpose, citing *MMC Power Sdn Bhd & Anor v. Abdul Fattah Mogawan & Anor* [2001] 1 CLJ 207, 211 CA; *Royal British Bank v. Turquand* [1856] 119 ER 474 HL; and *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & 12 Ors* [1998] 1 CLJ 793 FC.

In my judgment, I would give prior consideration to *Syawal Enterprise, supra,* where the facts reveal that a firm of solicitors had been instructed by one Soo Seng Chuan who beneficially owned all the shares in the company, the first plaintiff. He was however entered in the books of the first plaintiff as a minority shareholder only. The rest of the shares were held by two other Malay shareholders as his nominees in order to misrepresent the company as a Bumiputra company, when he in fact managed the entire affairs of the company. The judgment of VC George J (later JCA) is in relation to the defendant's application to strike out the plaintiff's writ under O. 18 r 19 of the Rules of the High Court 1980 on the ground that the firm of solicitors taking out a writ on behalf of the first plaintiff had no authority to do so.

It seems plain and obvious to me that the facts there do not concern the existence or otherwise of an agreement to purchase property, neither was there any semblance of the issue for determination before me. It is difficult to see how *Syawal Enterprise, supra,* can lend any support to the defendant's contention.

In the instant case, a proper perusal of the SPA reveals that at p. 9 thereof, s. 2 describes Aikpoint Development Sdn Bhd ie, the defendant as the vendor whose solicitors were Messrs Koh Nai Kwong & Associates, while the plaintiff was the purchaser. The letter dated 8 May 1999 from Messrs Koh Nai Kwong & Associates to the plaintiff's solicitors is so crystal clear that it leaves me with no doubt whatsoever that Messrs Koh Nai Kwong & Associates were indeed acting for the vendor Aikpoint Development Sdn Bhd ie, the defendant, to which the said letter has made a specific reference. I am therefore unable to accept the evidence that Messrs Koh Nai Kwong & Associates were at the material time acting for the trio and not for Aikpoint Development Sdn Bhd.

In relation to Lim and Cheng who are said to be the "beneficiaries of shares in the defendant" under certain undisclosed trust documents, I am of the view that their position as such does not in any way strengthen the case for the defendant. Being beneficiaries, and not directors nor registered shareholders of the defendant, they have no rights in the defendant and cannot play any role in the management of the defendant. This has been so explicitly stated in the judgment of Peh Swee Chin J (later FCJ) in *Sundram Properties Sdn Bhd v. Cyril Wettasinghe @ Christie Wettasinghe & 2 Ors* [1987] 1 CLJ 213 at p. 217 para 12 that a beneficiary of shares in a company registered in the name of another person as a trustee, has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatsoever to do. In my view, that judgment cited for the defendant and referred to in *Syawal Enterprise, supra*, militates against the defendant's contention.

In relation to the SPA, it is to be noted that YM Chong's authority as a director of the defendant may be actual or apparent (sometimes interchangeably referred to as ostensible).

Actual authority can arise eg, where there is a document setting out in precise terms the scope of this authority or where the principal has made known the agent's actual authority to all parties concerned so as to leave no room for doubt. As no such evidence has been adduced before me, I shall advert to the issue of YM Chong's apparent or ostensible authority as a director of the defendant.

Apparent or ostensible authority has been succinctly stated by Lord Diplock in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480 at 503 in the following words:

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

The above statement was applied by the Court of Appeal through the judgment of Haidar Mohd Noor JCA (later CJ (M)) in *MCC Power Sdn Bhd, supra,* wherein it was held that before the cessation of employment, an employee had the apparent authority to source for labour for his employer.

On the facts and the law, I am of the view that YM Chong as a director of the defendant had apparent or ostensible authority to represent the defendant in the sale and purchase transaction which resulted in the receipt of the deposit and the preparation of the fair copy of the SPA for execution by the defendant, in which case the defendant is estopped and prevented from asserting that the defendant is not bound by the contract.

In relation to the company resolution point, the celebrated case of *Turquand, supra,* which gave birth to the enunciation of the rule named after that case, provides the short answer. It means that strangers or outsiders dealing with a company in good faith are entitled to assume that matters of internal

management and/or acts within such company's constitution and powers have been properly carried out and duly performed. There is no duty cast upon an outsider contracting with a company to conduct an investigation as to the capacity of the company officials dealing with him other than to rely on what is disclosed by the company's documents such as Form 49 and the memorandum and articles of association of the company.

The rule in *Turquand*'s case has been consistently applied by our courts.

By way of illustration, in *Pekan Nenas, supra*, the relevant facts revealed that the board of directors of a family company had sold six pieces of properties to the appellant. Another faction of the family company had disputed the sale. One of the issues for determination by the Federal Court was whether the appellant had acted in good faith in order to invoke the Rule in Turquand's case. Edgar Joseph Jr FCJ (as he then was) at p. 206 line 5 applied the Rule in *Turquand*'s case and gave the answer in the affirmative, so that the company is debarred from establishing or relying on the facts that the proceedings of the company were irregular and unauthorised.

Reverting to the facts before me, there can be no doubt that the plaintiff has acted in good faith in dealing with the defendant through YM Chong and is entitled to assume that the internal management of the defendant and acts are within the defendant's constitution and powers which most certainly would include the decision to sell the land. The existence or otherwise of a company resolution for the sale of the land is exclusively an internal management for which the plaintiff is entitled to assume had been properly carried out and duly performed by the defendant.

In the circumstances, I hold that the answer to Issue 1 is in the affirmative.

Issue 2: Enforceability Of SPA

The defendant's stand is that the fair copy of the SPA is not enforceable.

It was contended for the plaintiff that the agreement is enforceable against the defendant, on the basis of *Turquand, supra; Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 2 MLJ 39 FC; SP *Annamalai Subramaniam Chettiar v. Perbadanan Pembangunan Bandar* [2000] 3 CLJ 318 CA; *Koh Kia Hiong v. Guo Enterprises Pte Ltd* [1990] 1 CLJ 919; [1990] 3 CLJ (Rep) 669 HC Singapore.

In my judgment, upon a reasonable reading of the fair copy of the SPA, in addition to the payment by the plaintiff to the defendant of the deposit, the crediting of the deposit into the account of the defendant's then solicitors, the resultant accumulation of interest and the finalisation of the SPA at the behest

of the defendant's then solicitors on the instructions of the defendant, there can be no doubt whatsoever that all these important facts point to the irresistible positive intention of the parties in proceeding towards the completion of the SPA rather than a withdrawal. All the essential ingredients of a legally binding contract *viz* consensus ad idem, an intention to create legal relations and consideration are present. There is no evidence of any vitiating factor to prevent the coming into force of a lawful contract. In my judgment, there can be no two views about the enforceability of the SPA.

In *Lim Kim Siong, supra*, where all the essential ingredients of a legally binding contract are in place, the Federal Court through the judgment of Abdul Hamid FJ (later CJ (Malaysia)) held that the agreement must be specifically performed.

A similar conclusion was arrived at by the Court of Appeal in SP *Annamalai, supra,* where judgment was delivered by Shaik Daud Md Ismail JCA (as he then was).

Finally, where a written memorandum contains the essential elements viz the names of the parties, description of the property, and the price as in *Koh Kia Hong, supra*, it was held by Chao Hick Tin JC (Singapore) to be a valid contract of sale and purchase of property and that the absence of the company's stamp was quite immaterial.

Conclusion

There are merits in the plaintiff's claim which the plaintiff has proved under s. 101 of the Evidence Act 1950. I therefore hold that the SPA is specifically enforceable and make an order in terms as set out at the commencement of my judgment herein, with damages, if any, to be assessed by the registrar of this court.

On the facts and the law, I order costs on the basis of one counsel only.